

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON POULTRY, INC., AND
COBB-VANTRESS, INC.'S JOINT REPLY TO STATE OF OKLAHOMA'S
OPPOSITION TO "TYSON FOODS, INC., TYSON CHICKEN, INC., TYSON
POULTRY, INC., AND COBB-VANTRESS, INC.'S JOINDER
IN PETERSON FARMS, INC.'S MOTION *IN LIMINE* REGARDING
POULTRY WATER QUALITY HANDBOOK" [DKT. NO. 2431]**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc. ("Tyson Defendants"), in reply to State of Oklahoma's Opposition ("Plaintiffs' Response") (Dkt. #2510) to the Tyson Defendants' Joinder in Peterson Farms, Inc.'s Motion in Limine regarding Poultry Water Quality Handbook (Dkt. #2431).¹ The Tyson Defendants respectfully move the Court to grant the Peterson Motion and in support thereof, the Tyson Defendants state as follows:

The Tyson Defendants incorporate herein Peterson Farms, Inc.'s Reply to State of Oklahoma's Opposition to Defendant Peterson Farms, Inc.'s Motion in Limine Regarding

¹ Peterson Farms, Inc.'s Motion in Limine Regarding Poultry Water Quality Handbook is referred to herein as the "Peterson Motion" and is located at Dkt. #2396.

Poultry Water Quality Handbook (the "PWQH") (Dkt. ____).² In their response to the Tyson Defendants' joinder, Plaintiffs incorporate their response to the Peterson Motion and further support their opposition with respect to the Tyson Defendants specifically by directing the Court to several loose connections between the Poultry Water Quality Handbook ("Handbook") and the Tyson Defendants. Pltfs.' Resp., 1-2. These connections, Plaintiffs allege, serve as examples of alleged knowledge "about the dangers of land applying poultry waste." *Id.* at 1. When viewed in the context of the record in this case however, this evidence is inadequate to overcome the substantial issues raised by the Peterson Motion regarding the admissibility of the Handbook.

Plaintiffs overstate the importance of the Handbook to the Tyson Defendants. Steve Patrick, Director of Environmental, Health and Safety for Tyson Foods, Inc., stated during his deposition that he was not familiar with the Handbook, had never read it, and had never discussed the handbook with any employee at Tyson. Exh. A, Patrick Dep., 152:6-8; 153:2-3; 154:18-21. Mr. Patrick could not recollect the Tyson Defendants ever distributing the Handbook to independent contract growers. *Id.* at 154:9-11; 193:20 – 194:1.

Plaintiffs note that the acknowledgements in the first edition of the handbook identify Ellis Brunton, a former Tyson Employee, as a contributor to the Handbook. Pltfs.' Resp., 2. Mr. Brunton worked in Quality Assurance and was not employed as part of Tyson's environmental team. Exh. A, Patrick Dep., 154:12-17. Quality Assurance is a division of Tyson interested primarily in the plant side of operations and end products rather than live production or environmental concerns. Mr. Patrick could not recollect ever discussing the Handbook with Mr.

² Defendants presume that Plaintiffs' opposition to the Tyson Defendants' joinder in the Peterson Motion serves as a response to the underlying Peterson Motion as specifically applied to the Tyson Defendants rather than in opposition to the Tyson Defendants' actual joinder in the Peterson Motion. Joinder to a motion is proper and permissible under Federal Rule of Civil Procedure 10, which permits a party to adopt by reference statements made in another pleading or motion.

Brunton. *Id.* at 154:6-8. Plaintiffs, by their own decision, chose not to seek Mr. Brunton's deposition to ascertain his actual involvement with the creation of the Handbook or how that participation would contribute to the Tyson Defendants' knowledge.

The Court should further note that the acknowledgements in the Handbook include thirty-five individuals without an explanation of their specific levels of involvement with or contribution to the Handbook, including a Professor Joe Barry at Oklahoma State University. *See* State of Oklahoma's Opposition to "Defendant Peterson Farms, Inc.'s Motion in Limine Regarding Poultry Water Quality Handbook" (Dkt. #2505), Ex. 1, at PIGEON 0945. Under Plaintiffs' theory, the Handbook would also evidence knowledge of the State of Oklahoma due to Professor Barry's contributions. The State had the same knowledge "about the dangers of land applying poultry waste" but chose instead to regulate and promote the application of litter in Oklahoma rather than restrict its use. Without further evidence, attributing knowledge to the Tyson Defendants based simply upon Mr. Brunton's undefined contributions to the Handbook would be highly misleading.

Plaintiffs further argue that the Handbook serves as evidence of the Tyson Defendants' corporate knowledge because "the first edition of the PWQH is cited as a reference in the Tyson Defendants' own 'Environmental Poultry Farm Management Manual,'" inferring that the Tyson Defendants used the Handbook "as they created their own environmental practices manual." Pltfs.' Resp., 2. As with Mr. Brunton's involvement, Plaintiffs overstate the evidentiary value of this reference in the Handbook to show corporate knowledge. The Manual is intended to provide information to producers about environmental farm management practices. Pltfs.' Resp., Ex. 1, at TSN0063CORP. The last two chapters of the Manual contain several lists of various resources which may aid a producer, including contact information for many associations,

federal and state agencies, and reference materials. *Id.* at TSN0097CORP – TSN0118CORP. The four and a half pages of reference materials do not represent footnotes within the Manual and are not cited within the text. There is no indication of the extent, if at all, to which the drafters of the Manual relied on the Handbook while creating the Manual or whether the references merely serve as additional sources of information.

Neither Mr. Brunton's contribution to the Handbook nor the inclusion of the Handbook as reference material in one document drafted by the Tyson Defendants is insufficient to show the Tyson Defendants' knowledge and overcome the substantial admissibility issues raised in the Peterson Motion. The Handbook is inadmissible and should be excluded by the Court.

WHEREFORE, Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc., respectfully request that the Court grant Peterson Farms, Inc.'s Motion in Limine regarding the Poultry Water Quality Handbook.

Respectfully submitted,

BY: /s/ Michael R. Bond
 Michael R. Bond, *appearing pro hac vice*
 Erin Thompson, *appearing pro hac vice*
 Dustin R. Darst, *appearing pro hac vice*
 KUTAK ROCK LLP
 234 East Millsap Road, Suite 400
 Fayetteville, Arkansas 72703-4099
 (479) 973-4200 Telephone
 (479) 973-0007 Facsimile
 -and-

Robert W. George, OBA #18562
 Bryan Burns, *appearing pro hac vice*
 TYSON FOODS, INC.
 2210 West Oaklawn Drive
 Springdale, Arkansas 72762
 (479) 290-4067 Telephone
 (479) 290-7967 Facsimile

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 North Robinson, Suite 900
Oklahoma City, Oklahoma 73102
(405) 239-6040 Telephone
(405) 239-6766 Facsimile

-and-

Jay T. Jorgensen, *appearing pro hac vice*
Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Gordon Todd, *appearing pro hac vice*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 Telephone
(202) 736-8711 Facsimile

Attorneys for Defendants Tyson Foods,
Inc., Tyson Chicken, Inc., Tyson Poultry,
Inc., and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
David P. Page
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Robert M. Blakemore
BULLOCK BULLOCK & BLAKEMORE, PLLC

lbullock@bullock-blakemore.com
bblakemore@bullock-blakemore.com

Frederick C. Baker
William H. Narwold
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
bnarwold@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
Craig A. Mirkes
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mws gw.com

Robert P. Redemann
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Earl Lee "Buddy" Chadick
Vince Chadick
BASSETT LAW FIRM

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com
bchadick@bassettlawfirm.com
vchadick@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Kerry R. Lewis
Colin C. Deihl
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com
klewiscourts@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Melissa C. Collins
FAEGRE & BENSON LLP

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
twalker@faegre.com
mcollins@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ Michael R. Bond

Michael R. Bond